

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

PREMIER HOTEL DEVELOPMENT
GROUP d/b/a Hospitality
Consultants, The Carnegie
Hotel, Austin Spring Spa
& Salon, and Luigies
EID 62-1761567 and 52-2261913;
PREMIER INVESTMENT GROUP
d/b/a Premier Investments
EID 62-1721108; and
SAMUEL T. EASLEY
SS 415-23-3809,

Debtors.

Nos. 01-20922, 01-20923
and 01-20940
Jointly Administered
Chapter 11

M E M O R A N D U M

APPEARANCES :

RICK J. BEARFIELD, ESQ.
P.O. Box 4210 CRS
Johnson City, Tennessee 37602-4210
Attorney for SunTrust Bank

FRED. M. LEONARD, ESQ.
27 Sixth Street
Bristol, Tennessee 37620

-and-

JAMES R. KELLEY, ESQ.
NEAL & HARWELL, PLC
2000 One Nashville Place
150 Fourth Avenue, North
Nashville, Tennessee 37219-2498
Attorneys for Samuel T. Easley

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This chapter 11 case of debtor Samuel T. Easley is before the court on the motion filed by SunTrust Bank on December 21, 2001, to vacate order confirming plan entered on December 12, 2001, or in the alternative to relieve SunTrust from the terms of the confirmed plan. The motion is premised on the debtor's failure to give SunTrust's attorney formal notice of the confirmation hearing. For the reasons discussed below, the motion will be denied. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A),(L), and (O).

I.

The debtor filed for chapter 11 relief on March 15, 2001. Thereafter, on May 18, 2001, Rick J. Bearfield, Esq. filed a "NOTICE OF APPEARANCE AND REQUEST TO SUPPLEMENT MATRIX" wherein Mr. Bearfield gave notice of his appearance as counsel for SunTrust and requested that "copies of all notices, orders, and other documents to be served in this case be served upon SunTrust Bank through its attorney" The certificate of service for the notice and request evidences that it was served on numerous parties, including the debtor, and his attorneys, Fred M. Leonard, Esq. and the firm of Neal & Harwell, PLC. Subsequently, on June 22, 2001, Mr. Bearfield filed a proof of claim on behalf of SunTrust. The proof of claim indicated that

notices should be sent to SunTrust Bank, c/o Rick J. Bearfield, P.O. Box 4210 CRS, Johnson City, TN 37602.

On May 10, 2001, an order was entered administratively consolidating this bankruptcy case with that of two entities in which the debtor was a principal, Premier Hotel Development Group and Premier Investment Group, nos. 01-20923 and 01-20940 respectively, both of whom were also represented by Mr. Leonard and the Neal & Harwell firm. After a joint plan of reorganization and disclosure statement was filed by Mr. Easley and the other debtors in their administratively consolidated cases on October 17, 2001, this court entered an order on that day scheduling a hearing on the adequacy of the disclosure statement for November 7, 2001, imposing a deadline for filing objections to the disclosure statement, and directing debtors' counsel to serve the order on all creditors and other parties in interest.

On November 21, 2001, this court entered an order approving the debtors' joint third modified disclosure statement, imposing December 7, 2001, as the deadline for voting on the proposed plan of reorganization and filing objections to confirmation of the plan, and scheduling the confirmation hearing for December 12, 2001. The order directed counsel for the debtors to serve the order on all creditors and parties in interest along with

the debtors' joint proposed plan and a ballot.

According to SunTrust's motion to vacate the confirmation order and Mr. Bearfield's affidavit, James R. Kelley, Esq., of the Neal & Harwell firm, unsuccessfully attempted to reach Mr. Bearfield by telephone on the morning of Friday, December 7, 2001, and Mr. Bearfield returned his call later that day at 4:06 p.m. In their telephone conversation that afternoon, Mr. Kelley informed Mr. Bearfield that the deadline for voting on the debtor's proposed plan of reorganization was in approximately one hour and inquired as to how SunTrust would vote. According to Mr. Bearfield's affidavit, he informed Mr. Kelley that he had not received any notice with respect to the disclosure statement or plan, had not received a ballot and had no knowledge of the deadline for voting on the plan, and, thus, "was unable to address his inquiries without those items." In Mr. Kelley's affidavit, he states that in the course of the conversation he advised Mr. Bearfield that there would be a confirmation hearing the next week although he did not recall telling him the specific day. Mr. Bearfield denies in his affidavit that there was any mention of the confirmation hearing.

The confirmation hearing was held as scheduled on Wednesday, December 12, 2001, and on that date the court entered an order confirming the joint plan of the debtors. Neither Mr. Bearfield

nor any representative of SunTrust appeared at the hearing. Mr. Bearfield states in his affidavit that on Monday, December 17, 2001, he was informed by counsel for SunTrust in the All American Warehouse & Distribution, LLC bankruptcy case pending in this court that the confirmation hearing in Mr. Easley's case had been held and his plan confirmed.

In SunTrust's motion to vacate confirmation order or in the alternative to relieve it from the terms of the confirmed plan, SunTrust acknowledges that notice of the confirmation hearing was mailed to it directly. SunTrust asserts, however, that once a creditor's attorney files an appearance and request for notice, the debtor is required to serve notices upon both the attorney and the creditor. Mr. Bearfield states in his affidavit that he "reviewed the Certificate of Service relating to the Third Amended Plan and Disclosure Statement and found that he is not listed on the Certificate of Service." SunTrust contends that the debtor's failure to give its attorney formal notice of the disclosure statement, the plan, and the hearing on confirmation of the plan violates the Bankruptcy Code and Federal Rules of Bankruptcy Procedure and its right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

In response, the debtor asserts that vacation of the

confirmation order is not appropriate because the only basis for revocation of confirmation under 11 U.S.C. § 1144 is if the order was procured by fraud. With respect to SunTrust's allegation that it has been denied due process, the debtor states that any such ruling must be based upon the totality of the circumstances. According to the debtor, such a consideration would take into account that SunTrust itself "has received all notices and pleadings relating to the confirmation of the plan," that "SunTrust's attorney received telephonic notice of the confirmation proceedings within an adequate amount of time to protect SunTrust's interests," and "SunTrust has failed to allege that it suffered any prejudice due to the allegation of a lack of notice." The debtor alleges that based on these facts, "SunTrust's motion to vacate the confirmation order is unfounded." The debtor asserts that in the event the court determines that relief in favor of SunTrust should be granted, the appropriate remedy is to except SunTrust's claim from the debtor's discharge rather than vacate the confirmation order.

SunTrust's motion, along with the debtor's response thereto, came before the court for hearing on January 22, 2002. At that hearing, Mr. Bearfield conceded orally that vacation of the confirmation order was not an appropriate remedy at this time

due to the fact that the joint plan contemplated a sale of property which had already taken place. Accordingly, the primary issue was whether SunTrust's debt should be excepted from the debtor's discharge under 11 U.S.C. § 1141. Notwithstanding the discrepancy in the two affidavits as to whether Mr. Kelley specifically mentioned the confirmation hearing in the telephone conversation, counsel for the parties stated that there was no dispute of material fact and asked the court to consider the issue as a matter of law. The parties were given two weeks in which to file stipulations and memoranda of law with the court thereafter to take the matter under advisement.

No joint stipulations have been filed. Instead, SunTrust filed a document entitled "PROPOSED STIPULATION" wherein it stated that "Paragraph 1" of Mr. Kelley's affidavit was stipulated. That paragraph only recites that Mr. Kelley is an attorney with the Neal & Harwell firm and that the firm serves as co-counsel to Mr. Easley and the Premier cases pending in this court. Mr. Easley in turn filed a document entitled "SUPPLEMENTAL PLEADINGS ... IN OPPOSITION TO SUNTRUST BANK'S MOTION TO VACATE ORDER CONFIRMING PLAN" which included Mr. Easley's affidavit and recited that "Counsel for Mr. Easley has attempted on numerous occasions to contact Mr. Bearfield to

discuss a stipulation. Mr. Bearfield has not returned any of my calls."

In his affidavit, Mr. Easley states that he is "the Chief Manager in All-American Warehouse, LLC." Mr. Easley further recites that All American owes SunTrust approximately \$5.2 million, secured by a first mortgage on the real property of All American with a value of \$6.5 million, such that there is an equity cushion of approximately \$1.3 million. In the "Supplemental Pleadings" document, Mr. Easley states that his personal liability to SunTrust is as a guarantor on the All American obligation and that due to the equity cushion, his "contingent liability as a guarantor is so remote as to be immeasurable." Thus, Mr. Easley argues that SunTrust's claim against him should be allowed in the amount of one dollar, which sum he will pay if the court determines that SunTrust's debt should be excepted from discharge due to the lack of formal notice. Lastly, Mr. Easley notes that SunTrust's counsel in the All American bankruptcy case had knowledge of his personal bankruptcy since they questioned him about these proceedings and the Premier cases in a deposition, the transcript of which is attached to Mr. Easley's affidavit. Although a review of this transcript indicates that there was some discussion regarding the Premier cases and Mr. Easley's personal bankruptcy case, the

deposition took place on August 27, 2001, weeks before the hearings on the disclosure statement and plan confirmation were even set. Therefore, there is no evidence that attorneys for SunTrust in the All American bankruptcy case had prior, actual knowledge of Mr. Easley's confirmation hearing.

II.

Under Rule 2002(b) of the Federal Rules of Bankruptcy Procedure, the clerk, or some other court-designated person, must give creditors not less than 25 days notice of any hearing on the adequacy of a disclosure statement or on the confirmation of a chapter 11 plan. Subsection (g) of Rule 2002 indicates where these notices are to be mailed:

All notices required to be mailed under this rule to a creditor, equity security holder, or indenture trustee shall be addressed as *such entity or an authorized agent may direct in a filed request*; otherwise, to the address shown in the list of creditors or the schedule whichever is filed later. If a different address is stated in a proof of claim duly filed, that address shall be used unless a notice of no dividend has been given.¹ (Emphasis supplied.)

Fed. R. Bankr. P. 2002(g). Rule 2002 should be read in conjunction with Rule 9010 which provides in pertinent part as follows:

¹Fed. R. Bankr. P. 2002(g) was amended effective December 1, 2001, but those changes are inapplicable to the present case, the pertinent facts having occurred prior to the amendment.

(a) AUTHORITY TO ACT PERSONALLY OR BY ATTORNEY. A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) NOTICE OF APPEARANCE. An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

Fed. R. Bankr. P. 9010(a) and (b).

In the present case, Mr. Bearfield filed a notice of appearance as counsel for SunTrust. The notice specifically directed that notices, orders, and other documents which were to be served in the debtor's case on SunTrust should be served through its attorney, Rick J. Bearfield, Esq. and listed Mr. Bearfield's address. Because SunTrust appeared in the debtor's bankruptcy case by an attorney as it was authorized to do under Rule 9010(a) and formal notice of this fact was given by Mr. Bearfield under Rule 9010(b), notices which were required to be mailed to SunTrust under Rule 2002 should have been mailed to Mr. Bearfield pursuant to Rule 2002(g). See *Alcatel Contracting, Inc. v. Slaughter Co. & Assoc.*, 251 B.R. 437, 439 (N.D. Ga. 1999) (Because law firm filed request for notice as counsel for creditor, bankruptcy court had an affirmative duty to send notice to law firm on behalf of creditor.); but see *In*

re Friel, 162 B.R. 645, 648 (Bankr. W.D.N.Y. 1994) ("[T]he filing of a simple notice of appearance on behalf of a creditor pursuant to Rule 9010(b) does not satisfy the directional requirements of Rule 2002(g) as to where the notices required to be sent by Rules 2002 and 3002 are to be sent to that creditor."). The debtor's failure to give formal notice of the confirmation hearing to SunTrust through Mr. Bearfield was in contravention of the notice requirements of the Federal Rules of Bankruptcy Procedure.

The issue to be decided by this court is whether this failure denies SunTrust due process such that SunTrust is excepted from the terms of the debtor's confirmed plan. In support of its assertion that due process is denied absent formal notice, SunTrust cites *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620 (10th Cir. 1984); *In re Lomas Fin. Corp.*, 212 B.R. 46 (Bankr. D. Del. 1997); *In re Birdneck Apartment Assoc., II, L.P.*, 152 B.R. 65 (Bankr. E.D. Va. 1993); and *In re Rideout*, 86 B.R. 523 (Bankr. N.D. Ohio 1988). In *Reliable Electric*, the Tenth Circuit Court of Appeals held that "the discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment of the United States Constitution." *Reliable Elec. Co.*, 727 F.2d at 623. The creditor in *Reliable Electric* had not been scheduled

as a creditor and thus received none of the notices in the chapter 11 case although early in the case the debtor's attorney had telephoned the creditor's attorney and advised him that the debtor had instituted chapter 11 proceedings. *Id.* at 621. Finding notice to be deficient and based on the conclusion that the creditor's claim would be substantially impaired without due process of law if it were forced to comply with the plan, the bankruptcy court concluded that the creditor's claim was not subject to the confirmed plan, a ruling affirmed by both the district court and court of appeals. *Id.* In reaching this decision, the court of appeals stated that general knowledge of a debtor's reorganization proceeding was inadequate notice of the confirmation hearing because "the creditor has a 'right to assume' that he will receive all of the notices required by statute before his claim is forever barred." *Id.* at 622.

Similarly, in the *Rideout* case, certain creditors were not given notice of the confirmation hearing on the debtors' chapter 11 plan although they knew the debtors were in bankruptcy. *In re Rideout*, 86 B.R. at 525-26. The court concluded that "the total absence of notice to the [creditors] concerning the Hearing on Confirmation, and the various deadlines, render[ed] the 'Order Confirming Plan' violative of the Fifth Amendment," *id.* at 527; and that the proper remedy was vacation of the

confirmation order. *Id.* at 531. In the *Birdneck Apartment* decision, the court did not reference any due process considerations, but vacated the order of confirmation pursuant to Fed. R. Civ. P. 60(b)(6) based on debtor's counsel's intentional failure to send copies of the plan or notice of the confirmation hearing to the bankruptcy counsel for NationsBank, a creditor of the debtor. *In re Birdneck Apartment Assoc., II, L.P.*, 152 B.R. at 67. And, on a related issue, the court in *Lomas* held that the failure to provide creditor's counsel with notice of the debtor's objection to the creditor's claim and the hearing thereon was a denial of procedural due process justifying vacation of the order disallowing the creditor's claim. *In re Lomas Fin. Corp.*, 212 B.R. at 55.

All of these cases are distinguishable in that there was no allegation in any of them that the creditor or its attorney had actual notice or knowledge of the hearing in question. Granted, in some of the cited decisions, the creditor had general knowledge of the bankruptcy itself, but this general knowledge has been ruled insufficient in reorganization cases since unlike a bar date in the chapter 7 context, deadlines in chapter 11 reorganization cases are not readily determinable. *Compare GAC Enter., Inc. v. Medaglia (In re Medaglia)*, 52 F.3d 451, 457 (2d Cir. 1995) (actual knowledge of debtor's chapter 7 petition is

a constitutionally permissible substitute for formal notice of discharge deadline); *Byrd v. Alton (In re Alton)*, 837 F.2d 457, 460 (11th Cir. 1988) ("[M]ere knowledge of a pending [chapter 7] bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates."); with *Bratton v. The Yoder Co. (In re Yoder Co.)*, 758 F.2d 1114, 1116 (6th Cir. 1985) ("A creditor's knowledge that a reorganization of the debtor is taking place does not substitute for mailing notice of a bar date."); *In re Rideout*, 86 B.R. at 527 (notice of chapter 11 case itself was insufficient to bind creditors to plan of which creditors had no knowledge).

In the present case, the creditor's counsel not only had knowledge of the bankruptcy case, he admittedly was advised that a plan of reorganization had been filed and of the deadline for filing ballots. Experienced bankruptcy counsel know that when ballots are being cast, a confirmation hearing has been scheduled and that a deadline for filing objections to confirmation of the plan has been set. See *In re Rideout*, 86 B.R. at 528 ("[T]he deadline for filing written Objections to the Plan is typically the same date as the one fixed for filing Ballots."). The court realizes that this information was conveyed to Mr. Bearfield less than a week prior to the

confirmation hearing. Nonetheless, there was sufficient time in which to either appear at the confirmation hearing and request a continuance due to insufficient notice or file a motion for continuance, neither of which were done.

SunTrust's motion is based on lack of *formal* notice of the disclosure statement, proposed plan, and confirmation hearing to its attorney.² According to SunTrust, "there is absolutely no justification for failing to give written notice" and "oral notice should never be acceptable." However, this court is not convinced that due process mandates the type of formal notice contemplated by the Federal Rules of Bankruptcy Procedure and that any notice other than written, formal notice is always constitutionally deficient, notwithstanding language in *Reliable Electric* which suggests otherwise. See *Reliable Elec. Co.*, 726 F.2d at 622.

"The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The means to that end is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Id.*

²Nowhere in Mr. Bearfield's affidavit does he state that he did not have prior, actual knowledge of the confirmation hearing.

The Tenth Circuit's statement in *Reliable Electric* that a creditor must receive formal notice of all the vital steps in a bankruptcy proceeding was based in part on the Supreme Court's decision in *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953), wherein the court stated that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." Other courts, however, have not recognized *New York, New Haven & Hartford Railroad* as equating formal notice with due process, noting that the case was decided on statutory rather than constitutional grounds. See *In re Medaglia*, 52 F.3d at 457; *Sequa Corp. v. Christopher (In re Christopher)*, 28 F.3d 512, 517 (5th Cir. 1994).

In *Christopher*, the Fifth Circuit rejected the argument that due process entitled a creditor to formal notice of the hearing on confirmation of the debtor's chapter 11 plan of reorganization, holding "that due process requires only notice that is both adequate to apprise a party of the pendency of an action affecting its rights and timely enough to allow the party to present its objection." *Id.* at 519 (citing *Grossie v. Sam (In re Sam)*, 894 F.2d 778, 782 (5th Cir. 1990)). See also

Matter of Pence, 905 F.2d 1107, 1109 (7th Cir. 1990) ("Due process does not always require formal, written notice of court proceedings; informal actual notice will suffice."); *In re Toth*, 61 B.R. 160, 166 (Bankr. N.D. Ill. 1986) ("[I]nformal notice which provides creditors with opportunity for a fair hearing will satisfy the requirement of notice and procedural due process, since creditors with informal notice can thereby be afforded protection equal to that afforded creditors with formal notice.").

As quoted above, the Supreme Court has held that due process requires "reasonable" notice. *Mullane*, 339 U.S. at 314. "In determining reasonable notice, 'the court must consider the totality of the circumstances, including whether the alleged inadequacies prejudice the creditors and whether the creditor receives notice in time to take meaningful action in response to the impending deprivation of its rights.'" *In re Shop N' Go P'ship*, 261 B.R. 810, 814 (Bankr. M.D. Pa. 2001) (quoting *In re Dartmoor Homes, Inc.*, 175 B.R. 659, 670 (Bankr. N.D. Ill. 1994)). As previously observed, in the telephone conversation between debtor's and SunTrust's counsel, Mr. Bearfield was advised that a plan had been filed and that the deadline to accept or reject the plan was about to expire. Implicit in this communication was that the confirmation process was taking

place. While the notice given by debtor's counsel was informal and did not convey all of the details regarding confirmation, there was sufficient information under the circumstances for Mr. Bearfield to realize that absent timely action on behalf of his client, its rights could be adversely affected by the debtor's plan. As observed by the Second Circuit Court of Appeals, "it is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right." *In re Medaglia*, 52 F.3d at 455.

The facts of the present case can be distinguished from those in *In re Leading Edge Products, Inc.*, 120 B.R. 616 (Bankr. D. Mass. 1990), another decision cited by SunTrust. In *Leading Edge Products*, creditor's counsel was advised in a letter from the trustee's counsel that the trustee had filed a plan of reorganization. *Id.* at 618. Two months later a confirmation hearing was held but the creditor was not given notice of the hearing. The court held that the plan was not binding on the creditor, stating "the Court is unconvinced that mere knowledge of the filing of a plan of reorganization shifts the burden to a creditor to inquire as to hearings on the adequacy of the disclosure statement and confirmation." *Id.* at 620.

In the present case, as previously noted, SunTrust not only had notice that the plan had been filed, it was also advised that formal consideration of the plan was underway, even though Mr. Bearfield denies that he was advised that a confirmation hearing was scheduled the next week as Mr. Kelley states. Nonetheless, an experienced bankruptcy practitioner such as Mr. Bearfield would have constructive notice that a confirmation hearing had been set, a fact not present in the *Leading Edge Products* case. As noted by the court therein, quoting a decision under the Bankruptcy Act, a different result might have been reached "if 'the creditor possessed actual knowledge, not merely of the general pendency of the Chapter X reorganization, but of each particular development therein to which formal notice would be required.'" *Id.* at 620 (quoting *Matter of Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 n.11 (1st Cir. 1974)).

III.

This court concludes that based on the totality of the circumstances, SunTrust had reasonable notice and an opportunity to be heard with respect to the debtor's plan of reorganization. As such, due process has been satisfied. Accordingly, an order will be entered denying SunTrust's motion to vacate confirmation order.

FILED: March 13, 2002

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE